Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

NYNEX REPLY COMMENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS

Page

NYNEX SUMMARY

This is the proceeding for the Commission to ensure new, effective and efficient competition in the long distance market -- a goal the Commission has described as one of the "three principal goals of the 1996 Act." As discussed in Section I of this Reply, Congress specifically recognized that active competition in this market has become static and collusive, with AT&T, MCI and Sprint still controlling over 90% of the market share, twelve years after divestiture. Indeed, price leadership and tacit price collusion has become so embedded that these IXCs have repeatedly raised rates to customers in lock-step, even as they enjoy substantial reductions in access costs. Congress has said that this must change, now.

Vigorous competition depends upon several key decisions in this proceeding. That is, the BOCs and their affiliates must be able to enjoy their economic operating economies in governance and support services -- where these do not involve BOC network operations and facilities; they must be able to engage in the joint marketing specifically authorized by Congress -- as will competing full service carriers; and the affiliate must be regulated as a nondominant carrier -- as are each and every incumbent IXC. Only by these actions will the Commission be able to meet the test of Congress to ensure that the long distance market is opened to the fresh, new competitive pressures of effective BOC long distance entry. There can be no doubt that it is this competitive test, i.e., have the BOC affiliates quickly and effectively entered the long distance market, and placed strong price and service pressures on the incumbents?, that will ultimately measure the *public benefits* of Commission action herein.

As detailed in Sections II-VII herein, entrenched market incumbents (big and small) want to delay and disable this competitive entry. In short, they seek to reverse the judgments of

Capitol Hill in the hallways of the Commission. Being unable to directly overturn the action of Congress to eliminate the complete MFJ bar to BOC competition, they instead propose so many rules, restraints and prohibitions that, if even half are adopted, these will indirectly preclude a competitive impact favorable to the customer. Others simply ask the Commission to delay competition to some future date. All such proposals should be rejected as contrary to Congressional purpose and Commission policy.

Specifically, NYNEX shows in Section II that the 1996 Act recognizes that BOCs and their affiliates may engage in joint marketing. This authorization could not have been stated more explicitly in the Conference Report. Contrary to the claim of AT&T and others, the affiliates are authorized to sell interLATA and intraLATA services, and to develop their own intraLATA services by the construction (not transfer) of such facilities, including the purchase of BOC unbundled elements or the resale of BOC services, as necessary, on the same basis as AT&T and others. Similarly, the BOC itself is clearly authorized to act as a sales agent for the services of its interLATA affiliate, or to refer such sales to the affiliate, as NYNEX proposes.

In Sections III and IV, NYNEX shows that non-network facilities and operating capabilities can be provided to the BOC and their affiliates from a holding company or third-entity subsidiary. In Section IV, NYNEX shows that the nondiscrimination provisions of Section 272(c) and (e) do not prohibit BOC activities, but rather authorize them subject to specific terms and conditions. The Commission has properly described its task in this area of shared services as ensuring that such *"reasonable competitive advantages"* are enabled, with the proper cost accounting methods put in place (Accounting Safeguards NPRM).

In Section V, NYNEX refutes the few commenters that contend that the 1996 Act restricts BOC provision of information services in a way that the MFJ never did. We also show that special rules applicable to prospective merger entities are unnecessary given the impact of other laws and regulations on their separate, independent operations.

In Section VII, NYNEX demonstrates that the commenters that propose "dominant carrier" treatment for the long distance affiliate fail to show that it has market power, or that a BOC could either successfully or without detection use its local exchange facilities to effect such market power. We also show that the same nondominant form of regulation should be applied to the affiliate in international markets.

Finally, in Section VIII, NYNEX answers those commenters that confuse the BOC's proper burden of production (information, documents, etc.) with the complainant's burden of proof, and contend that the latter should be shifted to the BOCs to disprove allegations in Section 271-272 enforcement proceedings. We also answer those that argue that private damage remedies are available in complaints under these Sections.

The Commission must take care in each area that it "not read into the 1996 Act a restriction on competition which is not required by the plain language of any of its sections" (Interconnection Order ¶ 336). This is especially important here, inasmuch as this proceeding represents its' best opportunity to enable new long distance competition.

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NYNEX REPLY COMMENTS

NYNEX Corporation ("NYNEX"), on behalf of its operating subsidiaries, hereby files its Reply Comments addressing the comments of those parties in this proceeding that would foreclose the affiliates of Bell Operating Companies ("BOCs") from effective and efficient competition in the provision of long distance and other telecommunications services. Adoption of such proposals would be contrary to the legislative purpose and intent embedded in the recently enacted Telecommunications Act of 1996 ("1996 Act") and with the public interest in competition -- rather than regulatory prohibitions and requirements -- as the best means of assuring technological development, economic growth and consumer choice.

I. THERE IS A PUBLIC INTEREST NEED FOR ADDITIONAL EFFECTIVE LONG DISTANCE COMPETITION NOW (NPRM ALL SECTIONS)

The fundamental premise of many commenters is that there is little to be gained from new market entry by the BOC affiliates, and potentially much to be lost.[1] Accordingly, they ask the Commission to erect barriers to effective competition and to establish elaborate new regulatory requirements which will negate natural RBOC operating efficiencies. The Commission should not allow these regulatory strategies to succeed. Instead, it must focus in this proceeding (as elsewhere) on ensuring effective and efficient BOC affiliate entry into, and participation in, new markets.[2] This is particularly important in the long distance telecommunications market that has long since become static and collusive, contrary to the public interest and the now clearly announced will of Congress.

Significantly, the Commission itself has described "promoting increased competition in the telecommunications markets . . . including the long distance services market" as one of the

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1 See, e.g., CompTel ("the long distance market is already competitive") (p. 19).

2 See, e.g., In the Matter of Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-150, FCC 96-309, released July 18, 1996, at ¶ 7:

> "Although we could prescribe rules that would completely prevent improper cost allocations by enforcing complete separation between regulated telecommunications operations and new activities. . .our success might destroy the potential competitive benefits of the economics of scope that BOCs and the incumbent local exchange carriers could realize. . . . Our task in this proceeding is to protect against improper cost allocations, while allowing the BOCs and other incumbent local exchange carriers to realize their reasonable competitive advantages. . ." (emphasis supplied).

"three principal goals of the 1996 Act."[3] Now, at the commencement of this proceeding, the Commission has similarly recognized the public interest purposes of the 1996 Act in promoting strong competition:

> "Enactment of the 1996 Act opens the way for BOCs to provide interLATA services in states in which they currently provide local exchange and exchange access services. Their provision of such interLATA services offers the prospect of increasing competition among providers of such services. BOCs can offer a widely recognized brand name that is associated with telecommunications services, the ability for consumers to purchase local, intraLATA and interLATA telecommunications services from a single provider (i.e. "one-stop shopping") and other advantages of vertical integration. Similar benefits could follow from BOC provision of interLATA information services and BOC manufacturing activities" (NPRM ¶ 6, footnotes omitted).[4]

With NYNEX's full support, the Commission began this procompetitive mission by issuing an NPRM to enable BOC "Out-Of-Region" market entry as a nondominant carrier in the week following the passage of the 1996 Act.[5] By June, it had issued its Report and Order

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3 In The Matter Of Implementation Of The Local Competition Provisions In The Telecommunications Act of 1996, First Report and Order, CC Docket 96-98, FCC 96-325, released August 8, 1996, at p. 7 ("Interconnection Order"). In earlier describing this "goal," the Commission stated: "the 1996 Act provides for the entry of the Bell Operating Companies (BOCs) and their affiliates into the interstate, interexchange market, after certain preconditions are satisfied. This entry can be expected to intensify competition in the interstate, domestic, interexchange market." In The Matter Of Policy And Rules Concerning The Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, CC Docket 96-61, FCC 96-123, released March 25, 1996 at ¶ 1 ("Interexchange NPRM").

4 In The Matter Of Implementation Of The Non-Accounting Safeguards Of Sections 271 and 272 Of The Communications Act of 1934, as amended; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Notice of Proposed Rulemaking, CC Docket No. 96-149, FCC 96-308, (July 18, 1996) at ¶ 6.

5 In the Matter of Bell Operating Company Provision of Out-Of-Region Interstate, Interexchange Services, Notice of Proposed Rulemaking, CC Docket No. 96-21, FCC 96-59 (released Feb. 14, 1996) ("BOC Out-Of-Region" proceeding).

providing for such entry.[6] Importantly, the Commission flatly rejected the proposals made by many of the same parties to this proceeding to encumber the BOC new market entrant with regulatory prohibitions and restraints which would have crippled its efforts. Instead, it stuck to the Congressional determination to enable, not disable, such competition.[7]

There is no mistaking the Congressional purpose in eliminating the prohibitions in BOC participation in the long distance market too long embedded in the Modification of Final Judgment ("MFJ"). The need for new, vital competition to challenge the entrenched interexchange carrier ("IXC") incumbents for the benefit of consumers nationwide is apparent. Thus, for example, the Senate Bill's majority floor manager noted:

> "After an initial post divestiture drop, AT&T's share of the overall interexchange market is now holding steady at about 60 percent even though AT&T charges higher prices than its rivals for comparable service. The combined market share of AT&T, MCI and Sprint remains at 94 percent, down only 5 percent since divestiture.
>
> Price competition has also not maintained pace with the computer industry. MCI and Sprint brought their prices up to AT&T's since divestiture, and the three major carriers' prices now move almost monolithically. Long distance prices actually fell faster before divestiture, when access prices are considered."[8]

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6 BOC Out-Of-Region, Report and Order, FCC 96-266 (released July 1, 1996).

7 This is precisely the approach applied by the Commission in rejecting the proposals of cable companies and others to impose joint marketing and structural separation constraints on BOC provisioning of open video systems, where such restraints were not imposed by Congress. In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, CS Docket No. 96-46, FCC 96-249 (released June 3, 1996) ¶¶ 246-247, 249. NCTA again attempts here to establish anticompetitive restraints against BOC direct sale of video services, after both the Congress and the Commission have rejected this proposal (2-6). Its proposals should be summarily rejected.

8 Remarks of Senator Pressler, Cong. Rec. § 8072-73 (June 9, 1995).

This genuine lack of price competition in the long distance market has been abundantly documented. In its decision to grant AT&T's "non-dominant" regulatory treatment, this Commission noted that "each time AT&T has increased its basic rate, MCI and Sprint have quickly thereafter matched the increase. . . ."[9] Indeed, the week after the passage of the 1996 Act, but before BOC entry was allowed on an effective non-dominant basis even "out-of-region," AT&T announced new tariff increases for basic residential toll service; Sprint and MCI followed the next week.[10]

Much has been made by AT&T and others to say that this pattern of upward price leadership does not reflect "tacit price collusion." However, whether or not actual price collusion is taking place is besides the real point; i.e., that the general public nationwide is not enjoying the benefits of dynamic, active price competition. In fact, the lack of competitive pressure on AT&T and others is now so embedded in the long distance marketplace that the large IXCs are able to raise their rates at the same time as local exchange carrier ("LEC") access charges are decreasing substantially.[11]

Congress has indicated that this must change. It is now time, in this proceeding, for the Commission to give substance to its own firmly stated purpose:

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9 In The Matter Of Motion Of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier, Order, 11 FCC Rcd 3271, ¶81 ¶ 83 (1995). ("AT&T Non-Dominance Order"). For example, in the five months prior to December 1993, AT&T filed three large consumer service rate increases, each of which was matched by MCI and Sprint. AT&T thereafter instituted three basic price increases in the first nine months of 1994, and each time MCI and Sprint followed. The same "lock-step" price leadership occurred again in December, 1994.

10 Telecommunications Reports, March 4, 1996, p. 36.

11 See, e.g., Interexchange NPRM, NYNEX p. 3 (". . . AT&T was able to raise its long distance rates in 1995 at the same time that the LECs were implementing a $1.2 billion reduction in their access charges.")

> "we believe that the 1996 Act provides the best solution to any problem of tacit price coordination, to the extent it exists currently, by allowing for competitive entry in the interstate interexchange market by the facilities - based BOCs and others."[12]

Contrary to the interests of some like TRA, this is not a matter to be delayed.[13] Congress intended the BOC affiliates -- freed of the MFJ and allowed to provide service subject to Sections 271 and 272 -- to promptly and effectively enter the marketplace. Thus, Senator Breaux, a sponsor of the bill and a member of the Commerce Committee, said of the final legislation:

> "Congress fully expects the FCC to recognize and further its intent to open all communications markets to competition at the earliest possible date. The debate over removing legal and regulatory barriers to competition has been resolved with this legislation. Unnecessary delays will do nothing more than invite vested interests to "game" the regulatory process to prevent or delay competition."[14]

The interests of those who argue for elaborate regulatory requirements and a "transition" to nondominant regulation are not the interests that Congress meant to serve. In fact, Congress rejected them outright:

> "There is no question as to what is motivating the opposition of private opponents of BOC entry. The more hoops the BOCs have to jump through ---the more decision hurdles for them, the more chance there is of delaying their entry and thus delaying

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12 Interexchange NPRM ¶ 81.

13 See, e.g., proposal of TRA to prohibit joint marketing -- expressly authorized by Congress -- "until such time as meaningful competition has emerged in the local telecommunications markets" (p.13). Such competitive constraints were argued for in the legislative process and clearly rejected by Congress.

14 Cong. Rec. § 713 (Feb. 1, 1996) (emphasis added). That exactly such a strategy is well underway could not have been made clearer than in the remarks of AT&T's CEO who observed: "We didn't send our lawyers on vacation. We are already bird-dogging the FCC and the state regulatory commissions," leading him to predict that "it could be well into the next century before any of the [RBOCs] serve their first long-distance customer in their own territory." John J. Keller, AT&T Challenges The Bell Companies, Wall St. J., June 12, 1996 at A3, col. 1.

having to face their competition. We do not blame the opponents for this effort: As the late Senator Magnuson wisely said; "All each industry seeks is a fair advantage over its rivals."[15]

Similarly, the Commission should not be persuaded that it can and should establish anticompetitive rules and regulations now, with an eye towards relaxing these requirements later as it manages a "transition" to full competition.[16] The Commission has had first-hand experience in the Computer Inquiry proceedings that regulations once adopted are difficult -- if not impossible -- to relax, even when these clearly disserve the public interest. Rather, it should look to fully enable new competition now, subject only to the express conditions of Section 272 established by Congress after years of public policy debate. It must continue to take care, in its consideration of the issues discussed below, that it not "read into the 1996 Act a restriction on competition which is not required by the plain language of any of its sections."[17]

II. THE COMMISSION MUST NOT PLACE UNAUTHORIZED RESTRICTIONS ON THE ABILITY OF BOCS AND THEIR AFFILIATES TO ENGAGE IN JOINT MARKETING (NPRM ¶¶ 90-93)

As shown above, Congress did not intend to bar the BOCs from full and effective participation in the robust competitive telecommunications marketplace it sought to create through the Telecommunications Act of 1996. To that end, Congress specifically authorized the BOCs and their affiliates to jointly market exchange and interLATA services under the conditions specified in Section 272(g).

In an apparent desire to stave off genuine competition from the BOCs for as long as possible, some providers urge the Commission to impose various extra restrictions and

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[15] Remarks of Senator Ashcroft, Cong. Rec. 8159 (June 12, 1995).

[16] See, e.g., Time Warner 39.

[17] Interconnection Order ¶ 336.

prohibitions on future BOC marketing practices. As shown below, these proposed "safeguards" are unsupported by the language of the Telecommunications Act and contrary to its intent, and must therefore be rejected.

A. BOC InterLATA Affiliates May Provide "Integrated" Exchange Service, Through Resale or Otherwise

A few commenters contend that BOC interLATA affiliates should be banned from providing local exchange service altogether.[18] These assertions completely disregard Section 272(g)(1) of the Act, which permits a BOC separate affiliate to market and sell telephone exchange services provided by the BOC. Under this joint marketing provision, a BOC separate affiliate purchasing exchange service from the affiliated BOC on an arm's length, nondiscriminatory basis can bundle, package and resell that service to customers in conjunction with its own interLATA service, subject only to the requirement that the BOC make its exchange service available to unaffiliated providers on the same basis.[19]

A BOC interLATA affiliate is also free to provide exchange service through facilities of its own. The Act does not, as AT&T suggests, prohibit the "integration of exchange and interLATA facilities" within any BOC affiliate.[20] On the contrary, the structural separation effected by Section 272 is appropriately limited to situations involving the exchange network of an incumbent BOC or a "successor or assign" thereof.[21]

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[18] Teleport 6-8; NCTA 7-11.

[19] *See*, LDDS Worldcom 12 (BOC interLATA affiliate can provide "'blended, discounted, or bundled offerings of local and interLATA services").

[20] AT&T 19-21.

[21] Section 272 of the Act imposes its interLATA separation requirements on a BOC or affiliate "which is a local exchange carrier that is subject to the requirements of Section 251(c)."

As the Commission has observed, the Act:

> does not prohibit carriers who own local exchange facilities from jointly marketing local and interexchange service. Nor does it prohibit joint marketing by carriers who provide local exchange service through a combination of local facilities which they own or possess, and unbundled elements.[22]

There is no justification for prohibiting a BOC interLATA affiliate from providing exchange service through facilities it constructs entirely on its own, separate from the BOC, supplemented as needed by the purchase of wholesale services or unbundled network elements from the BOC under generally available terms and conditions. Starting from scratch, with no preexisting facilities or customer base, and prevented by the separation requirements of Section 272(b) from unfairly leveraging the market share and exchange network of its incumbent LEC affiliate, the BOC interLATA entity would be no different from any unaffiliated telecommunications carrier in terms of its dealings with the BOC and its impact on the market.[23]

Section 272(a)(1). Section 251(c), in turn, applies only to an "incumbent local exchange carrier," which is defined in Section 251(h) as an entity that provided telephone exchange service on the date of enactment of the Act and was a member of the exchange carrier association, or a "successor or assign" of such an entity. A BOC affiliate providing exchange service entirely through resale, through purchased unbundled elements or through its own newly-constructed facilities would not be considered either an incumbent LEC or a "successor or assign" of one, any more than would an unaffiliated provider entering the market on the same basis.

22 Interconnection Order ¶ 336. Even a BOC may "integrate" interLATA and exchange facilities under Section 272(e)(4).

23 See, also MCI 23. AT&T also argues wrongly that Section 272(g)(1) would not be necessary if a BOC's Section 272 affiliate were free to purchase unbundled network elements or build its own exchange facilities (p. 22). However, that Section allows the separate affiliate to market or sell telephone exchange services provided by the BOC, if other entities are able to do so. Congress contemplated the purchase of unbundled network elements available to all, and in no way precluded the construction of new exchange facilities by the affiliate.

Unable to find in the Act any express prohibition on the provision of exchange service by a BOC interLATA affiliate through its own network, AT&T tries to read one into the "operate independently" requirement of Section 272(b)(1), reasoning that without such a bar there would be "no practical way to prevent the BOC or its parent from engaging in the coordination and joint planning that Section 272 prohibits."[24] AT&T suggests that the BOC and its affiliate might agree to implement unspecified "new exchange functions" in the affiliate's new network, leaving competitors "dependent on the unimproved and atrophied network of the BOC itself."[25] However, the "overriding reality," to borrow a term from AT&T, is that the BOC will have adequate incentive to keep its exchange network up-to-date and in good working order, if for no other reason than that its own interLATA affiliate will be heavily dependent on it for years to come. On the other hand, it is perfectly appropriate for any facilities-based provider to compete on the basis of network technology, as well as price. The drastic and unauthorized step of restricting the BOC affiliate to resale is not, as AT&T asserts, the only way to prevent violations of Section 272(b). It is, however, a way to prevent the BOC affiliate from competing effectively against AT&T. For this reason it should be denied.

B. The Joint Marketing Permitted By the BOCs Under Section 272(g)(2) Includes Inbound Calling and Referrals

In its initial comments NYNEX demonstrated that Section 272(g)(2) of the Act permits a BOC, at a minimum, to sell interLATA service to customers as a sales agent for its separate affiliate, and to refer or transfer customer calls to the affiliate for further handling.[26] Some

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[24] AT&T 21.

[25] AT&T 21-22.

[26] NYNEX 16-18.

commenters nevertheless propose restrictions that would prevent the BOCs from engaging even in these most basic of joint marketing functions.

For example, AT&T claims that "regardless of the scope of permissible joint marketing in other contexts, the BOCs are independently restricted from such activities when new customers call to order local service, or when existing local customers contact the BOC to advise it that they are switching primary interexchange carriers ('PICs')."[27] AT&T cites no provision in the Act to that effect, other than a vague reference to "the equal access requirements that were in effect under the MFJ," and a remark that the Commission "has long relied on equal access and informed customer choice to foster competition."[28]

Going even further, CompTel would impose a sort of "don't ask, don't tell" policy on BOC joint marketing, prohibiting BOC employees "for any reason" even from advising *existing* local exchange customers that the BOC or its affiliate provides interexchange service.[29]

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[27] AT&T 57; See, also, CompTel 25.

[28] Id. Under the MFJ, of course, the BOCs were the only local exchange providers in their areas, and were not allowed to provide interLATA service even through separate affiliates. The Court thus had no occasion to address what marketing practices might have been permitted by the BOCs in the fully competitive, multi-provider environment created by the Telecommunications Act. AT&T's reliance on Section 251(g) of the Act in support of its proposed restrictions on BOC joint marketing is therefore unfounded, since that section only incorporates "the same" equal access obligations that applied to a BOC on the date of enactment. At best, AT&T is merely speculating as to what the MFJ might have come to mean in a competitive, multi-provider environment. But there is no need to speculate about what the MFJ might have come to mean with respect to joint marketing, because Congress in Section 272(g)(2) specifically permits joint marketing. And, even to the extent that Section 251(g) equal access provisions might apply, Congress has explicitly authorized the Commission to adopt rules superseding these provisions. In any event, NYNEX will continue to inform its customers of their PIC options and abide by their selections, and will comply with all other equal access obligations that existed on the enactment date of the Act.

[29] CompTel 25.

CompTel would also prohibit a BOC from "transfer[ring] a call from a local exchange customer to its interexchange subsidiary."[30] AT&T does not go that far, but asserts that "to the extent that the BOC refers customers to its long distance affiliate -- whether by providing the affiliate's telephone number, by way of on-line transfer, or otherwise -- the BOC must do so for all other carriers on reasonable and nondiscriminatory terms and conditions."[31]

None of these proposed restrictions has any support in the language or intent of the Telecommunications Act. A BOC's ability to jointly market its telephone exchange services in conjunction with the interLATA service offered by its separate affiliate, authorized by Congress in Section 272(g)(2), necessarily includes the ability to attempt to sell both interLATA and local service to customers at the same time. Prohibiting a BOC from doing so at the very time the customer is purchasing telecommunications services would essentially preclude joint marketing altogether. Furthermore, because the BOC can complete the sale of interLATA service itself, *a fortiori* it can stop short of that and refer or transfer the customer to its interLATA affiliate.[32] Section 272(g)(3) of the Act makes clear that the BOC need not undertake to provide the same "joint marketing" service to any other provider.[33]

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[30] Id. One wonders how the possibility of such a transfer would arise if, as Compel would have it, the BOC may not even mention to the customer that its affiliate provides interLATA service.

[31] AT&T 58.

[32] Even assuming arguendo that a BOC may not "provide" interLATA service, except through a separate subsidiary, it can certainly act as a sales agent of the affiliate on an arm's length basis as proposed in our Comments (pp. 16-18).

[33] Section 272(g)(3) provides that "[t]he joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection [272](c)."

The BOC joint marketing authorized by Section 272(g)(2) will take place only after the separate affiliate has been authorized to provide in-region interLATA service -- when all of the items on the Section 271(c)(2)(b) "competitive checklist" have been satisfied and Commission approval obtained. By then both end users and competing carriers will have options and protections that were not available at the time of *Computer II* or the MFJ. Large carriers such as AT&T, freed from the joint marketing restrictions of Section 271(e), will be heavily marketing their own local exchange services, as will fully integrated providers like the new MFS/WorldCom.[34] Retail customers will no longer need to call a BOC to order local exchange service. Under these circumstances there is no legal or policy basis for concluding that Congress, while permitting the BOCs to engage in joint marketing, intended to tie their hands in the manner suggested by these commenters.

C. AT&T's Unwarranted CPNI Restrictions Should Be Rejected

AT&T asserts that "to the extent a BOC is otherwise permitted to provide customer information to, or access or use such information on behalf of, its affiliate and does so, it must make the same information available to unaffiliated carriers on the same terms."[35] Under Section 222 of the Act, a BOC must obtain authorization from the customer before disclosing local exchange CPNI to its interLATA affiliate or using that information in the joint marketing of the affiliate's interLATA service. Where customer authorization has been obtained, however, the BOC is, and should be, free to do so without disclosing the same information to unaffiliated carriers. Indeed, where the customer has authorized disclosure only to the BOC affiliate (as is

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[34] See. "Worldcom Reaches Pact to Buy MFS in $14.4 Billion Stock Deal," Wall Street Journal, August 26, 1996, p. A3, col. 1.

[35] AT&T 59. See. also AT&T 34.

likely in this scenario), the BOC would violate the privacy provisions of Section 222 were it to disclose the customer's CPNI to other providers as AT&T urges.[36]

In tacit acknowledgment of this, AT&T then claims that a BOC should be required to seek and obtain customer authorization on behalf of all unaffiliated entities if it does so for its interLATA affiliate.[37] Finding no such requirement in the CPNI provisions of Section 222, AT&T bases its proposition instead on "the non-discrimination requirement of Section 272(c)(1)." But Section 272(g)(3) expressly exempts the joint marketing and sale of services permitted by BOCs and their affiliates under Section 272(g) from the nondiscrimination provisions of Section 272(c). However, while subject to Section 222, a BOC's treatment of CPNI in conjunction with its permissible joint marketing activities is not separately and differently subject to Section 272(c)'s nondiscrimination requirements --excepted for joint marketing activities generally.[38] AT&T's proposed CPNI restrictions have no basis in law or policy and should rejected.

D. Other Unauthorized Restrictions Should Also Be Rejected

Predisclosure. AT&T urges the Commission to require any BOC whose affiliate engages in the joint marketing permitted by Section 272(g)(1) to "announce the availability and terms of

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[36] The Commission reached a similar conclusion regarding AT&T's use of customer information in BankAmerica Corporation, et al., v. AT&T [Universal Card], 8 FCC Rcd 8782, 8787 (1993).

[37] AT&T 59-60.

[38] The Commission has observed that joint marketing, where permitted by a regulated entity under certain safeguards, "necessarily involves sharing of some customer network information with a non-regulated affiliate," whether structurally or non-structurally separate. BankAmerica Corporation, et al., *v.* AT&T [Universal Card], 8 FCC Rcd at 8787 (1993), citing Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7609-14 (1991).

any such arrangement at least three months prior to implementing it."[39] Absent such a requirement, AT&T contends, "the BOC affiliate would have a significant and discriminatory 'first mover' advantage over unaffiliated carriers."[40] Section 272(g)(1) deals with the ability of the BOC affiliate (and others) to market and sell "telephone exchange services provided by" the BOC. These services will be sold pursuant to publicly filed tariffs and agreements. No additional waiting period is prescribed by the statute, and none should be required by the Commission.

Teaming Arrangements. MCI argues that Section 272(g)(2) should be interpreted to prohibit a BOC, prior to in-region interLATA approval, from "teaming" with "another entity" that provides interLATA service.[41] Ignoring years of MFJ practice, MCI falsely claims that "such a [teaming] program constitutes the marketing and selling of interLATA services," and, with equal lack of justification, argues that such teaming "is prohibited to the BOCs by Section 272(g)(2)."[42] However, Section 272(g)(2) only prohibits a BOC from marketing or selling interLATA service provided by its own affiliate. Nothing in the MFJ prohibited,[43] and nothing in the Act prohibits, a BOC from entering into a teaming arrangement with an unaffiliated interLATA provider to market their respective services to the same customers, provided all

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39 AT&T 55.

40 Id. 55-56 (footnote omitted).

41 MCI 47.

42 Id.

43 See, e.g., Response of the United States to Ameritech's Motion for Clarification and Waiver of the Decree Regarding the Provision of Shared Telecommunications and Other Services, June 29, 1984, p. 10, n. 8: "[T]here are a variety of ways, including 'teaming arrangements,' for example, by which [a BOC] may participate in the provision of shared service arrangements by providing permitted products and services which comprise elements of such arrangements."

applicable nondiscrimination requirements are satisfied and provided the BOC's activity under the particular teaming agreement does not amount to the provision of interLATA service by the BOC itself.

Third-Party Requirements. Finally, the Commission should reject the notion that Section 272(b)(3) requires a BOC and its interLATA affiliate to conduct any joint marketing by contracting with an outside marketing entity.[44] Neither MCI nor AT&T takes that position,[45] and even Sprint (which does) concedes that "the statute does not require this result."[46]

III. THE ACT PERMITS THE PROVISION OF CORPORATE GOVERNANCE FUNCTIONS AND ADMINISTRATIVE SUPPORT SERVICES ON A CENTRALIZED BASIS (NPRM ¶¶ 55-64)

NYNEX earlier demonstrated that the Act does not preclude the provision of corporate governance functions and administrative services by a holding company or service entity to both a BOC and its Section 272 affiliate.[47] Many commenters, however, recommend the adoption of separation criteria far more expansive than the very specific requirements of the Act. Plainly, incumbent entities, whether they be IXCs, manufacturers or information service providers, many of which already take advantage of the efficiencies possible through centralized functions and services in their own business, are eager to impose as many handicaps as possible on a group of new competitors, thus delaying their entry into the market, or making it uneconomic. These commenters ask the Commission to ignore the specific commands of Congress and impose

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[44] NPRM ¶ 92.

[45] AT&T 57; MCI 48.

[46] Sprint 49.

[47] NYNEX 20-35.

restrictions which Congress could have chosen to adopt, but did not.[48] Such an action would clearly disrupt the carefully crafted provisions Congress enacted to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition....[49] We address these proposals below.

A. "Operate Independently" (Section 272(b)(1))

NYNEX agrees with Teleport "that the standards for independent operation established in the Competitive Carrier decision are most appropriate for this section of the Act." [50] Those standards require the affiliate to: (1) maintain separate books; (2) not jointly own transmission or switching facilities; and (3) take any tariffed services from it's affiliated LEC under the generally applicable tariff.[51] While two of the safeguards are included in other provisions of Section 272, the prohibition of the joint ownership of transmission or switching equipment is directly related to the "operate independently" requirement of Section 272(b)(1). Thus, Section 272(b)(1) does in fact require more than the sum of Section 272(b)(2)-(5): it enforces the separation prescribed

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[48] Time Warner (p.20) argues that sharing of administrative services between BOCs and their separate affiliates should be limited to joint use of established third party entities, pointing to the example of NYNEX's former procurement subsidiary, NYNEX Materiel Enterprises. The Commission's clear accounting and auditing requirements now ensure that the economic benefits of sharing sourcing services, like the benefits of sharing other support services, can be achieved and properly allocated between a BOC and its affiliates. In fact, the Commission has recognized that its task is to facilitate natural BOC operating economies as part of their "reasonable competitive advantages" (Accounting NPRM ¶ 7).

[49] Conference Report 113.

[50] Teleport 19.

[51] NPRM ¶ 59.

by Congress by prohibiting the BOC and it's separate affiliate from jointly owning transmission and switching facilities for the provision of local exchange service.

Both AT&T and MCI argue that the Commission should interpret Section 272(b)(1) to require the additional structural safeguards of Computer II.[52] Their arguments suffer from a number of fatal defects. First, AT&T appears to be deliberately, and misleadingly, equating the statutory "operate independently" (emphasis added) requirement with its own formulation of the objective of Section 272: "to prohibit the integration of exchange and interexchange facilities.."[53] NYNEX urges the Commission to focus on the clear language of the Act. Prohibiting joint ownership of switching and transmission facilities ensures that the Section 272 affiliate *operates independently* of the BOC, as required by the Section 272(b)(1)[54]

Second, AT&T rejects the Competitive Carrier standards because "two of the three are separately required by other provisions of Section 272."[55] Of course, the remaining safeguard, as noted above, is directly related to the "operate independently" requirement, so AT&T's argument is unpersuasive. This is particularly the case in view of the fact that many of the safeguards established by Computer II, which AT&T urges the Commission to adopt, are also separately required by Section 272.

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52 AT&T 19-24, MCI 25-26.

53 AT&T 19. AT&T also claims the purpose of Section 272 is "to prevent the BOCs or their affiliates from engaging in the joint and integrated design, planning, construction or operation of exchange or interexchange facilities..."(p. 16) As noted above (Section II.A), the separate affiliate may itself do this. Section 272(e)(4) also explicitly permits the BOC to do this for certain interLATA services, supra (Section IV.E).

54 NYNEX recognizes that the transfer of material operating assets and the associated operating personnel to a new entity would then make that entity a BOC within the meaning of Section 3(4)(B) of the Act.

55 AT&T 23.

Third, AT&T and others recommend the adoption of a whole array of additional restrictions as part of the "operate independently" requirement, including separate computer facilities, separate physical space, separate software development, etc. Congress was plainly aware of these Computer II safeguards when it enacted Section 272, and could have chosen to explicitly include all of the Computer II requirements in Section 272, but it chose not to do so.[56] There is no reason for the Commission to adopt such requirements now.[57]

Efforts to bolster such assertions by pointing to the more specific requirements of Section 274 should be rejected.[58] On the contrary, the far more specific terms of Section 274 demonstrate that, when Congress actually sought to prohibit the sharing of certain services, it knew how to do so. Section 272 cannot be made more restrictive by reference to Section 274.[59]

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[56] AT&T 22-23; MCI 25-26.

[57] A similar point can be made concerning CompTel's proposal that the Commission adopt the safeguards devised under the terms of the MFJ in response to Ameritech's "Customers First" proposal (15-16), and Sprint's argument that the terms of the GTE Consent Decree Order be used to define this statutory provision (25-26). Each of these recommendations suffers from the same critical defects: either the Commission must make the implausible assumption that Congress was unaware of previous Commission policies or MFJ proposals relating to independent operation; or it must assume the statutory language Congress enacted was intended to prohibit the centralized provision of functions and services which the Commission and the MFJ previously permitted.

[58] See, e.g,. MCI 27.

[59] The consequences of AT&T's interpretation of Section 272(b)(1) are not trivial, nor are they in accordance with the statute. For example, AT&T argues that this provision requires the Commission to prohibit a BOC's separate affiliate from constructing its own exchange facilities as well as purchasing unbundled network elements from its affiliated BOC. AT&T 19-21. This anticompetitive, albeit creative, proposition is answered by NYNEX in the joint marketing section, supra (Section II.A).